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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ABELINO YANEZ et al.,

Plaintiffs and Respondents,

v.

CHARYTO GARDEA et al.,

Defendants and Appellants.

G041399

(Super. Ct. No. 07CC07671)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Daniel J. Didier, Judge. Affirmed.

Woods & Krolikowski, Adam J. Krolikowski and Rebekah Conrad Bhansali for Defendants and Appellants.

Payne & Fears, Daniel L. Rasmussen and Mark E. Earnest for Plaintiffs and Respondents.

Defendants Charyto Gardea, her mother Nidia Uriarte, her sister Alma Avalos, her brother Antonio Avalos, and her husband Juan Gutierrez appeal from a judgment in which the court imposed a constructive trust on funds embezzled from Gardea's employer, plaintiff Ross Pallets, Inc. and its sole owner, plaintiff Abelino Yanez. They contend the court applied the wrong burden of proof and that the evidence was legally deficient. We reject their claims and affirm the judgment.

FACTS

Ross Pallets repairs, sells and purchases wooden pallets. Gardea worked for the company for almost 10 years, first as an office assistant then as office manager. She controlled the company's finances and her responsibilities included daily accounting of bought and sold pallets, tracking cash use, preparing payroll information and documents for tax purposes, collecting accounts receivable, and paying company bills.

Yanez, who had become close friends with Gardea and was one of her children's godfather, trusted her with the company's finances and his personal bank accounts, checks, and credit cards because he lacked computer, accounting, and English skills. He relied on her to provide accurate reports of the company's finances.

A large portion of the company's business uses cash to purchase damaged pallets to be repaired and re-sold. To obtain the cash, Gardea wrote company checks out to "cash," had Yanez sign them, and had them cashed at a bank. Although she was solely responsible for tracking the cash, she failed to keep accounting records.

In an emergency when Yanez was unavailable, Gardea had exclusive authorization to use his signature stamp. Gardea admitted she had used the signature stamp over a hundred times. She deposited company checks into her and her relatives' personal and business bank accounts claiming it was money owed her; she also used them to pay her mortgages, the rent at her restaurant, and her utilities and electric bills. Yanez

did not know of or authorize these acts and never saw the cancelled checks. He had relied on Gardea's reports the company was profitable and his finances were in order but he discovered otherwise when a credit application was rejected.

Plaintiffs sued defendants, alleging causes of action for conversion, fraud, restitution/unjust enrichment, and accounting. Following a bench trial, the court issued a statement of decision establishing a constructive trust in plaintiffs' favor "based upon fraud, conversion and unjust enrichment" and dismissed the tort causes of action as duplicative and moot. It imposed a constructive trust for plaintiffs on the sum of \$476,906.11, consisting of checks improperly drawn on the Ross Pallets' account, plus prejudgment interest in the amount of \$62,063.12. Judgment was entered jointly and severally against all defendants in the amount of \$538,969.23 and included additional separate judgments against Alma Avalos, Juan Gutierrez, and Nidia Uriarte.

DISCUSSION

1. Standard of Review

Defendants claim entitlement to a de novo review because "[t]he meaning of a disputed writing is . . . a question of law . . ." and there was no extrinsic evidence for the trial court to weigh. They assert that "[c]hecks are written instruments" and that the dispute in this case "concerns the purpose of the checks signed by [plaintiffs] or their agents and given to [defendants.]" But the checks themselves were not ambiguous and even if they were, where as, here the parties presented conflicting extrinsic evidence the substantial evidence rule applies to the evidentiary conflict. (*In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 746-747.)

In their reply brief, defendants also argue "[t]he interpretation of a statute is a question of law and subject to de novo review on appeal." We do not consider claims made for the first time in a reply brief absent a showing of good cause, which defendants

have failed to make. (*Shade Foods, Inc. v. Innovative Product Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10.)

In any event, this case does not involve an *interpretation* of Civil Code sections 223 and 224 or the checks as defendants assert, but rather whether sufficient evidence supports the court's imposition of a constructive trust. On that, we agree with plaintiffs that the substantial evidence standard of review applies with respect to factual findings (*Marshall v. Marshall* (1965) 232 Cal.App.2d 232, 246), but we review the trial court's selection of the constructive trust remedy for an abuse of discretion (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 878).

Nevertheless, defendants are correct that an appellate ruling on the sufficiency of the evidence is a decision upon a question of law. (*People v. Barragan* (2004) 32 Cal.4th 236, 246.) We conclude as a matter of law that substantial evidence supports the judgment and that the court did not abuse its discretion in selecting the constructive trust remedy.

2. *Burden of Proof*

Defendants contend plaintiffs were required to establish their claim for a constructive trust by clear and convincing evidence and that the trial court committed reversible error "by applying the lower evidentiary threshold of preponderance of the evidence." We need not determine this issue because defendants failed to cite any portion of the record showing the court applied a lower burden of proof in determining whether plaintiffs were entitled to a constructive trust. Although the court stated the preponderance of the evidence was the burden of proof for the tort causes of action, it did not identify a burden of proof for the imposition of a constructive trust. But it specifically found the monetary amounts subject to the constructive trust "*were clearly and intentionally* converted from Ross Pallet[s'] accounts for Gardea's permanent use and ultimate loss to [plaintiffs]." (Italics added.) Given that and absent any contrary

indication, assuming without deciding the clear and convincing is the correct standard we may presume the court applied that standard in establishing the constructive trust. (*In re Bernadette C.* (1982) 127 Cal.App.3d 618, 625.)

3. *Sufficiency of the Evidence*

Defendants argue plaintiffs failed to establish by clear and convincing evidence their entitlement to a constructive trust under the theories of fraud, conversion and undue influence. But “on appeal from a judgment required to be based upon clear and convincing evidence, ‘the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent’s evidence, however slight, and disregarding the appellant’s evidence, however strong.’ [Citation.]” (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 881.)

We agree with plaintiffs that defendants waived appellate review of their insufficiency of the evidence claims. “[A]n attack on the evidence without a fair statement of the evidence is entitled to no consideration when it is apparent that a substantial amount of evidence was received on behalf of the respondent. [Citation.] Thus, appellants who challenge the decision of the trial court based upon the absence of substantial evidence to support it “are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed waived.” [Citations.]’ [Citation.]” (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.)

Defendants’ opening brief is devoid of discussion of the evidence supporting the judgment. They simply assert the facts in a manner beneficial to them. In any event, substantial evidence supports the trial court’s findings and judgment.

“The principal constructive trust situations are set forth in Civil Code sections 2223 and 2224. Section 2223 provides that “[o]ne who *wrongfully* detains a thing is an involuntary trustee thereof, for the benefit of the owner.” (Emphasis added.)

Section 2224 provides that: “[o]ne who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, *or other wrongful act*, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.” (Emphasis added.) The only conditions necessary to create a constructive trust are those stated in the above sections. [Citations.] In order to provide the necessary flexibility to apply an equitable doctrine to individual cases, these sections state general principles for a court’s guidance rather than restrictive rules. [Citation.]” (*GHK Associates v. Mayer Group, Inc.*, *supra*, 224 Cal.App.3d at p. 878.)

Essentially, “[a]ll that must be shown is that the acquisition of the property was wrongful and the keeping of the property by the defendant would constitute unjust enrichment. [Citations.]” (*Calistoga Civic Club v. City of Calistoga* (1983) 143 Cal.App.3d 111, 116.) A constructive trust is a proper remedy for fraud and conversion (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1069) as well as employee embezzlement (see *Church v. Bailey* (1949) 90 Cal.App.2d 501, 504).

Three conditions are required for the imposition of a constructive trust: “the existence of a *res* (property or some interest in property); (2) the *right* of the complaining party to that *res*; and (3) some *wrongful* acquisition or detention of the *res* by another party who is not entitled to it. [Citations.]” (*Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 990.) These elements are similar to those for conversion, “which are “the plaintiff’s ownership or right to possession of the property at the time of the conversion; the defendant’s conversion by a wrongful act or disposition of property rights; and damages.”” (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1507.)

The evidence supports the court’s determination that defendants converted money belonging to plaintiffs. The monetary amounts subject to the constructive trust were taken from Ross Pallets’ checking account and defendants wrongfully exercised

dominion over the funds without Yanez's authorization, consent or knowledge, resulting in monetary damage to plaintiffs.

Defendants argue the court erred in imposing a constructive trust based on conversion because plaintiffs "cannot allege with any specificity a sum certain of money which had been converted." The contention lacks merit.

Plaintiffs identified and the trial court awarded specific sums in 7 out of 8 categories of claimed damages consisting of checks drawn on Ross Pallets' checking account that were (1) "deposited directly into Gardea's personal account in the amount of \$191,325.93"; (2) "deposited into the checking account of [Gardea's restaurant] to pay . . . expenses in the amount of \$86,300.00"; (3) "to purchase liquor and supplies . . . for [Gardea's restaurant] in the amount of \$4,437.88"; (4) "to pay [employees of Gardea's restaurant] in the amount of \$43,578.40"; (5) "deposited directly to [Gardea's restaurant's] business bank accounts in the amount of \$19,000"; (6) "deposited into Gardea's relatives['] checking accounts in the total amount of \$86,131.95"; and (7) "wrongfully conveyed to [Gardea's] relative[s'] accounts, without any evidence of consideration . . . from Ross Pallets" The court determined these amounts to be "patent and unqualified fraudulent transfers for the personal use of Gardea, her family or her business" and "clearly and intentionally converted from Ross Pallet[s'] accounts"

As to the eighth category of damages, Ross Pallets' checks amounting to over \$700,000 made out to cash for pallet purchases and cashed at a bank, the court found it was "difficult, if not impossible to segregate the checks legitimately used for business purposes and those that may have been converted to cash and then allegedly converted to personal use. There may be strong inferences that much or part of this category was converted to personal use by . . . Gardea, but insufficient evidence supports including this entire category, in toto, as embezzled, converted or fraudulent transfers." Because as plaintiffs note "the trial court did not award [them] damages for any *cash* that may have

been converted by [defendants]”, we reject as moot defendants’ claim that plaintiffs “only offered de minimis evidence of missing cash amounting to no more than a generalized claim for money.”

The evidence amply supports a constructive trust in plaintiffs’ favor. Because the evidence supports the judgment on a tenable legal theory, it is unnecessary to discuss the other bases upon which the court imposed the constructive trust.

4. Unclean Hands

Defendants contend the court should have considered their claim of unclean hands because plaintiffs “paid employees in cash to avoid payroll taxes.” On the contrary, the court specifically found not “credible defendant’s assertion that Yanez paid all employees cash, in excess of payroll checks, in order to minimize payroll taxes.”

Defendants also claim “Yanez was taking cash from Ross Pallets . . . and transporting it to Mexico” to “make the business appear to be failing” and hide the cash from his wife, whom he was divorcing. They cite 80 pages in the record but fail to either identify where in those 80 pages support for their claim can be found or explain the various documents contained therein. We deem the argument forfeited as it is not our obligation “to search the record for evidence on a point raised by a party whose brief makes no reference to the specific pages where the evidence can be found. [Citation.]” (*Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1486; Cal. Rules of Court, rule 8.204(a)(1)(C).)

5. Remaining Claims

Defendants make a number of other contentions: (1) “[n]early every check . . . bears the signature of” Yanez, his former wife, or his daughter and was written to ““cash”” for ““pallets purchase”” contrary to Yanez’s declaration; (2) Yanez’s claim he borrowed money without repaying it is belied by the evidence; (3) Yanez could not

specify a specific sum wrongfully taken by Gardea; (4) Yanez's claim that Gardea converted money from his personal account was specious because he "used cash from [that] account for the purchase of pallets"; (5) the checks cashed by Gardea were not unauthorized; and (6) no money was missing from the accounts. These were all factual issues for the trial court to determine on conflicting evidence. Defendants essentially request that we reweigh the evidence and re-determine issues of credibility, which we will not do. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.)

In their reply brief, defendants also assert the court failed to trace the funds and demonstrated prejudice against them. Defendants have waived this argument on appeal as this court does not consider matters raised for the first time in the reply brief. (*Shade Foods, Inc. v. Innovative Product Sales & Marketing, Inc.*, *supra*, 78 Cal.App.4th at p. 894, fn. 10.)

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.